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BEFORE THE
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendments to Parts 1, 2, 87, and 101
of the Commission's Rules to
License Fixed Services at 24 GHz

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WT Docket No. 99-327

**OPPOSITION TO PETITIONS FOR RECONSIDERATION OF
TELIGENT, INC.**

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Pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. §1.429(f), Teligent, Inc. ("Teligent") hereby submits its Opposition to the Petitions for Reconsideration filed in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

In the Order, the Commission took great steps to modernize the operational requirements and licensing procedures for the 24 GHz band. It made additional spectrum available in this time of rapid technological advance and increasing demand for broadband fixed wireless services. In so doing, the Commission properly balanced the many public interest objectives it is required to satisfy when licensing new wireless telecommunications services. In particular, the Order represents a careful balance of the Commission's obligation to promote the offering of telecommunications services in rural areas with Congress' mandate to adopt market-based spectrum policies.

¹ Amendments to Parts 1, 2, 87, and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, FCC 00-272 (rel. Aug. 1, 2000) ("Order").

Of particular note for the instant proceeding, the Commission amended its rules for the 24 GHz band by adopting an EA-based licensing approach as opposed to the SMSA territories originally used for this band. Replacing SMSAs, which exclude rural areas, was a clear effort by the Commission to promote the offering of fixed wireless telecommunications services to rural communities throughout the nation.² The decision to use EA-based licenses is, of course, a predictive judgment by the Commission that such license territories will best ensure the availability of competitive fixed wireless telecommunications services nationwide for both urban and rural areas.³ The Commission reasoned that EAs are the best basis for geographic area licensing in the 24 GHz band because:

- smaller service areas are unlikely to offer the economies of scale necessary to provide competitive service;⁴
- flexible partitioning and disaggregation/aggregation policies will foster the rapid delivery of service in rural areas while bidding credits and bidding consortium will make it more likely that small businesses can participate successfully in the auction;⁵
- experience demonstrates that smaller businesses are not precluded from participating in EA auctions;⁶ and
- geographic parity with competing services in the 39 GHz band is desirable.⁷

² Id. at ¶ 12.

³ The Commission must primarily be concerned with promoting the general welfare and public interest through the provision of competitive telecommunications services in all areas of the nation, and, secondarily, with the broad participation of rural interests in wireless auctions. See generally 47 U.S.C. § 309(j)(3).

⁴ Order at ¶ 15.

⁵ Id. at ¶ 16-17.

⁶ Id. at ¶ 15, n.56 (noting that in the recently completed 39 GHz auction where EA's were used, eighteen of the twenty-two small bidders who participated in the auction were successful in winning licenses).

⁷ Id. at ¶ 16.

In their petitions for reconsideration, the Rural Telecommunications Group (“RTG”) and the Small Business Administration (“SBA”) once again take aim at the Commission’s decision to use EA-based licenses for the 24 GHz band.⁸ They contend that EA licenses inhibit rural carriers’ ability to participate in the 24 GHz auction and to use wireless services to offer competitive telecommunications services in rural areas. In stating their case, however, petitioners effectively ask the Commission to abandon widely accepted principles regarding the allocation of spectrum to the highest valued users, and they do so without proffering corresponding evidence to disprove these principles. Instead, petitioners have simply restated arguments raised in prior filings in this proceeding -- arguments which the Commission squarely addressed and rejected with adequate explanation. Petitioners have failed to raise any new reasons that would cause the Commission to reconsider its analysis.

II. THE USE OF EA-BASED LICENSES IN THE 24 GHz BAND WILL ENSURE THAT COMPETITIVE FIXED WIRELESS TELECOMMUNICATIONS SERVICES WILL BE PROVIDED IN ALL AREAS OF THE NATION.

As an initial matter, it is important to point out that the decision to use EA-based licenses is a predictive judgment by the Commission based on sound economic principles aimed at achieving several public policy objectives.⁹ Determining the optimal size for a license area is

⁸ Amendments to Parts 1, 2, 87, and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Petition for Reconsideration of the Rural Telecommunications Group* (filed Aug. 31, 2000) (“RTG Petition”); *Petition for Reconsideration of the Office of Advocacy of the United States Small Business Administration* (filed Aug. 31, 2000) (“SBA Petition”).

⁹ See generally F. C. C. v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981) (recognizing “that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.”) (internal quotations omitted).

not, nor can it ever be, a precise science.¹⁰ In fact, such decisions are precisely the type of actions for which agencies are delegated discretion to utilize their expertise and experience. Because the Commission cannot be expected to predict precisely the market definitions that will realize all of its public interest objectives, it is important for the Commission to base its initial decision on a reasonable analysis and understanding of the services that are likely to be provided; the economies of scale necessary to provide such services; competitive factors which would bear on the service's licensing framework; and to tie that decision with a flexible license disaggregation/aggregation policy that will ensure that spectrum is put to its highest and best use.¹¹ The Commission has done just that in this proceeding. It has properly determined that EA-based markets in the 24 GHz service will likely provide the necessary economies of scale to offer competitive telecommunications services, and to the extent different sized territories are

¹⁰ See Gregory L. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87, 95-96 (1997) ("Rosston and Steinberg") ("The Commission can also help promote economically efficient use of spectrum by establishing the initial geographic scope and bandwidth of licenses in a manner that is sensitive to the different characteristics of different frequencies, as well as the different spectrum needs of various services. In general, the Commission should set initial allocations to approximate its estimate of the efficient use of spectrum. Because of transaction costs, sensible initial allocations are important to quickly achieving efficient spectrum use. . . . At the same time, the Commission must be aware that its estimate of efficient spectrum use is necessarily imperfect. . . . Therefore, the Commission should . . . permit aggregation, subject to anticompetitive scrutiny, and disaggregation of spectrum into different size blocks. In this way, the Commission can allow the market to correct for the imperfections inherent in the initial allocation process.").

¹¹ See Order, Concurring Statement of Commissioner Harold Furchtgott-Roth at 1 ("The size of the initial license areas should not matter. Our disaggregation and partitioning rules should facilitate a secondary market that permits licensees to slice and dice spectrum for the highest-valued use."); see also Rosston and Steinberg at 99 ("In order for competition to bring consumers the highest valued services in the most efficient manner, we believe competing users of spectrum need flexibility to respond to market forces and demands. This flexibility includes the freedom to determine how they will use spectrum, how much spectrum they need, and the geographic area in which they will provide service.").

preferable in certain areas, flexible disaggregation/aggregation policies will further the likelihood that such a result will be realized.

In opposition, petitioners continue to focus on only one aspect of the Commission's many public interest obligations, namely, the provision of fixed services in rural areas. While this is certainly one of the Commission's responsibilities, petitioners fail to recognize that this is not the only basis upon which the Commission should render its judgment. Specifically, the petitioners argue that the Commission should reconsider its decision to use EA-based licenses because 1) they favor national carriers, who, according to petitioners, have less interest in providing service in rural areas;¹² 2) they discourage small businesses from participating in auctions;¹³ 3) there is no reason for parity with other fixed wireless services;¹⁴ and 4) partitioning and disaggregation has "a mixed record" while raising transaction costs for rural carriers.¹⁵ In the alternative, RTG has asked that if EA-based licenses are retained, the substantial service requirement be changed to a population coverage requirement and a fill-in policy for unserved areas.¹⁶ The Commission, however, has already considered these arguments and rejected them. In addition, petitioners have not submitted new or persuasive support to demonstrate that the initial conclusions were in error.¹⁷

¹² RTG Petition at 3.

¹³ SBA Petition at 2.

¹⁴ RTG Petition at 5.

¹⁵ Id. at 5; SBA Petition at 2.

¹⁶ RTG petition at 7.

¹⁷ See generally 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, *Memorandum Opinion and Order on Reconsideration*, FCC 00-376 at ¶ 19 (rel. Nov. 8, 2000) (denying petitions

Each of these issues has been addressed both by the Commission and through comments in the record. The fundamental flaw in petitioners' arguments is that they require the Commission to ignore well-settled economic principles and years of experience implementing a market-based spectrum policy. In order to accept the petitioners' propositions, the Commission would have to conclude that rural carriers alone will provide service in rural areas while non-rural carriers would not. Stated differently, petitioners would have the Commission believe that opportunities for efficiency vary with the identity of the licensee and that incentives toward profit maximizing vary by carrier. In fact, RTG clearly relies on this proposition when it states that "[r]ural telephone companies and cooperatives do not have the short profit deadlines that a large carrier like Teligent must meet. . . . Rural telephone companies [are] less driven by shareholder profit responsibilities" ¹⁸ Were the Commission to adopt this view, it would be required to abandon all aspects of its market-based licensing policies.

Every licensee has the incentive to provide service whenever profits can be derived. Petitioners have no reason to doubt that carriers that acquire EA licenses containing rural areas will provide service to those areas. If, however, another carrier can offer service more efficiently

for reconsideration because, inter alia, petitioner "raises no new arguments that would cause [the Commission] to reconsider [its] analysis, and therefore [the Commission] den[ied] its request for reconsideration."); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Fifth Memorandum Opinion and Order*, FCC 00-405 at ¶ 8 (rel. Nov. 22, 2000) (concluding that petitioners did "not submit new or persuasive evidence that [the Commission's] conclusions were in error. . . ." and therefore reaffirming its original holding).

¹⁸ RTG petition at 4. To the extent this statement by RTG is valid, i.e. that rural carriers are not interested in providing service more efficiently than larger carriers, one can only be left to conclude that these carriers are not operating in a competitive market or that the universal service subsidies they may be receiving are radically distorting their incentives to operate efficiently.

to a particular area, then the licensee can be expected to act in an economically rational manner and partition the license to the operator that can make more valuable use of the spectrum. It is for this reason, among others, that the Commission need not modify the substantial service requirement as RTG has requested. The Commission can be confident that substantial service will be provided everywhere there is an efficient market for such services, either by the auction winner or by another operator who values that spectrum more highly.¹⁹ This is a fundamental principle of the Commission's market-based spectrum policy that cannot be abandoned lightly and without evidence to the contrary.

Because the Commission cannot reliably predict public demand for services, and given the rapid evolution of technology, it is important that the Commission permit the free movement of spectrum to the most valued user (including rural operators if that is the case). The adoption of liberal disaggregation/aggregation policies, as well as the recently announced inquiry into spectrum leasing,²⁰ go a long way toward ensuring that secondary spectrum markets do indeed operate efficiently. While petitioners continue to broadly assert that disaggregation policies are not working for them, in the absence of any record evidence, the Commission must consider this highly improbable. Moreover, while it may be true that transaction costs are associated with disaggregating spectrum,²¹ and the Commission should indeed make every effort to minimize

¹⁹ See Rosston and Steinberg at 99 (“[F]lexibility increases users’ incentives to expand spectrum capacity by enabling them to profit from investments in more efficient use of spectrum, either by using spectrum for additional purposes or by transferring the authorization to use part of the spectrum to a party that values it more highly.”) (emphasis added).

²⁰ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, FCC 00-402 (rel. Nov. 27, 2000).

²¹ See SBA petition at 2.

such costs, there is no reason to believe that the transaction costs for disaggregation would be any higher than the transaction costs associated with aggregating spectrum were the Commission to adopt smaller license territories.

Furthermore, although SBA contends that “EA licensing may discourage small business from participating in the 24 GHz auction,”²² the notion that the Commission's auction policies should favor one class of auction participant is contrary to the Commission's efforts to adopt spectrum policies that lead to improved competition and ultimately the more efficient provision of telecommunications services to consumers. It is well accepted that through these policies consumer welfare nationwide has been, and will continue to be, enhanced. Distributional concerns such as those suggested by petitioners should not be favored over the gains realized by all consumers through greater competition and the provision of telecommunications services more efficiently.

Finally, in this proceeding, as in the 39 GHz proceeding, the Commission properly has defined the market size of 24 GHz licenses in a manner that it believes is optimal for the provision of competitive wireless telecommunications service.²³ Stated differently, EA licenses promote greater consumer welfare and facilitate wider service because they permit the realization of scale economies. In response, petitioners claim that the Commission has manufactured the concerns about parity with the 39 GHz band, asserting instead that parity cannot be achieved

²² Id. at 2.

²³ In the 39 GHz proceeding, RTG similarly opposed using EA licenses and petitioned the Commission to delay the auction of 39 GHz licenses so that they could be modified and reduced in size. The Commission, apparently recognizing the soundness of its decision to issue EA licenses, went ahead with the auction as scheduled. See Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 GHz (39 GHz) Band Scheduled for April 11, 2000, Reply Comments of the Rural Telecommunications Group (filed Dec. 20, 1999).

because of a “hodgepodge of licensing schemes already in place in the broadband arena.”²⁴ This argument misses the point. If the Commission were to adopt smaller license areas, it should only do so because increased efficiencies, and the enhancements to consumer welfare that would derive from such efficiencies, warrant such a decision -- not because it favors one class of auction participants. Petitioners have not proven this to be the case here. As the Commission has recognized, in this instance, smaller license areas would likely lead to increased transaction costs as carriers are forced to combine licenses to obtain the necessary scale. Not unimportantly, these are costs that carriers in other competitive spectrum bands do not have to incur, and this is a legitimate parity concern.²⁵ While petitioners may choose to disregard the effect that imposing different regulatory costs may have on the provision of competitive telecommunications services, the Commission cannot.

At the heart of the petitioners’ claims is the misstated assertion that “three out of the five Commissioners expressed concern that the Commission’s policies in [the Order] would exclude meaningful auction participation by rural carriers.”²⁶ By isolating particular sentences from the Commissioners’ separate statements, petitioners would have the Commission believe that the establishment of EA-based licenses was not supported by a majority of Commissioners. This is simply not true. If it were, then the Commission would have reached a different outcome. While Commissioner Furchtgott-Roth stated that he would have “considered” using smaller territories for one or two of the channel-blocks, this provides no basis for the Commission to reconsider the

²⁴ RTG petition at 5.

²⁵ Other costs would increase as well for 24 GHz licenses that would not exist for fixed wireless licenses in other bands which provide similar and competing service, such as those attributable to RF coordination and planning costs.

²⁶ RTG Petition at 2.

EA decision.²⁷ In fact, his concurring statement clearly reveals that the Commissioner thoroughly considered the petitioners' proposition and rejected it. Moreover, Commissioner Ness made clear that she supported the adoption of EA-based licenses, but was interested in reviewing other ways to encourage the construction of wireless systems in rural areas in all bands -- a concern only tangentially related to this 24 GHz proceeding.²⁸ As suggested by Commissioner Ness, the comprehensive development of policies and rules to promote rural broadband services across all technologies and spectrum bands is appropriate and Teligent fully supports such an effort. However, a narrow review of this Order to address these concerns would do little to accomplish the overall objective while resulting in a disproportionate disadvantage to 24 GHz operators vis-à-vis competing spectrum users. In fact, efforts such as the Commission's recently announced proposals regarding secondary spectrum markets are a more appropriate and comprehensive forum to address the Commissioners' concerns over the efficient operation of spectrum markets in rural areas.

²⁷ Order, Concurring Statement of Commissioner Harold Furchtgott-Roth at 1; Concurring Statement of Commissioner Gloria Tristani at 1.

²⁸ Id., Separate Statement of Commissioner Susan Ness at 1.

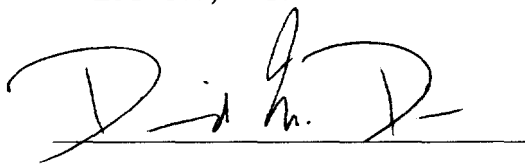
III. CONCLUSION

For the foregoing reasons, Teligent respectfully requests that the Commission deny the petitions for reconsideration and maintain EA-based territories for future 24 GHz licenses.

Respectfully submitted,

TELIGENT, INC.

By:

A handwritten signature in black ink, appearing to read "P. L. Verveer", written over a horizontal line.

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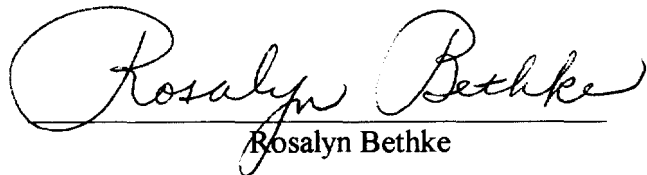
CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 30th of November, 2000, copies of the attached document were delivered by first-class mail or by hand delivery, as indicated, on the following parties:

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